Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

79-2042

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

JOSEPH BRONSTEIN,
Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner, Joseph Bronstein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra.*, pp. A-3 - A-12) is not yet reported. The opinion of the district court (App. A, *infra.*, pp. A-1 – A-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980 (App. B, *infra.*, p. A-3). A timely petition for rehearing was denied on May 29, 1980 (App. C, *infra.*, p. A-13), and this petition for certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTION PRESENTED

Where the defendant in a criminal tax prosecution pleaded guilty pursuant to an agreement under which he was entitled to call witnesses at the time of sentencing and the prosecutor agreed to remain silent at sentencing, except to correct factual misrepresentations, was the prosecutor nevertheless free to comment where defense counsel restated the testimony of a witness to the effect that the defendant attempted to disclose to the Internal Revenue Service errors on the corporation's returns and where defense counsel urged the sentencing judge to "give credit" to the defendant for a good faith attempt to correct the errors?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

STATEMENT

Indicted with two co-defendants for conspiracy and for multiple substantive tax offenses relating to the tax returns of a closely held corporation, petitioner, Joseph Bronstein, following six days of trial, entered into a plea agreement with the United States attorney (App. B, *infra.*, pp. A-3 – A-5). The plea agreement provided in paragraph 4:

> The Government will waive its right of allocution and will remain silent at the time of sentencing except to correct any factual misrepresentations which may occur.

Paragraph 7 of the plea agreement provided:

> The defendants expressly reserve the right to call one or more witnesses at the time of judgment and sentence on the matter of sentencing.

(App. B, *infra.*, p. A-5; CR 56, p. 3)* Pursuant to the agreement, Bronstein pleaded guilty to two counts of the indictment, charging him with conspiracy and with subscribing to a false corporate return (App. B, *infra.*, p. A-3).

Prior to the date set for sentencing, the corporation's attorney, Robert Shoemaker, sent a presentence letter to the Court urging probation for Bronstein. Shoemaker pointed out that Bronstein had divulged to him that the corporation had substantial unreported income in 1973 and ultimately had authorized him to disclose this fact to the Internal Revenue Service. Shoemaker also wrote that Bronstein instructed John Pelletier, the corporation's comptroller, an indicted co-defendant, to file a correct amended return for 1973 and a correct return for 1974 (App. B, *infra.*, p. A-5; CR 70, Ex. B).

On the date scheduled for sentencing, July 20, 1979, the trial judge advised the parties that he wanted to learn more about the policy of the Internal Revenue Service regarding voluntary disclosures. Two witnesses testified for the government concerning the policy and its application to Bronstein and Pelletier. Shoemaker testified for Bronstein that in April or May, 1974, Bronstein revealed to him that he had been taking cash from the corporation by writing cash purchase slips on nonexistent purchases

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*"CR" are to the trial court clerk's record. "RT" references are to the reporter's transcript of oral proceedings of July 20, 1979.

and that the corporation's 1973 return understated income. After a series of meetings, Shoemaker testified, Bronstein authorized him in January, 1975, to disclose to the Internal Revenue Service the error in the return filed for 1973. He also testified that Bronstein instructed Pelletier to prepare a correct amended return for 1973 and a correct return for 1974. After this meeting, Bronstein and two other employees each redeposited $400,000 to the corporation in order to pay the withholding taxes on the diverted funds (App. B, *infra.*, pp. A-5 – A-6; RT 66-67).

Cross-examining Shoemaker, government counsel brought out that Bronstein had not disclosed to Shoemaker that the scheme of extracting cash through false purchase slips had been in effect continuously since 1970 (RT 75). When cross-examination moved to the subject of the decision as to how to characterize the cash withdrawals on the corporation's 1974 tax return, the trial judge interrupted that he had heard what he wanted to hear from Shoemaker (RT 77). During the ensuing colloquy between government counsel and the trial judge, defense counsel objected on the basis of the plea agreement to the prosecuting attorney's comments which pertained to the recommended nature and severity of the sentence, as opposed to factual comments or cross-examination that elicited factual information (App. B, *infra.*, p. A-6; RT 81). The government responded that it was acting within the boundaries of the plea agreement since it was correcting the factual misrepresentation that Bronstein had attempted to make a voluntary disclosure. The court ruled that the hearing was not the "time of sentencing" and that the government was therefore not bound by the plea agreement (App. B, *infra.*, p. A-6).

After the court excused Shoemaker, defense counsel addressed the court, and commented that Bronstein should "get credit" for having issued instructions to file an amended return and for having made the decision to make a disclosure to the Internal Revenue Service. If the amended return was also incorrect, defense counsel urged, Pelletier, not Bronstein, was to blame. Bronstein at least had made a good-faith effort to correct the error (App. B, *infra.*, p. A-7; RT 101, 106).

The court then asked for the government's position. The government responded that (1) Bronstein did not in fact rely on Pelletier to file correct returns; (2) Bronstein had withdrawn money from the corporate account from 1970 through 1974; (3) Bronstein was not truly repentent when the conversations with Shoemaker took place since he was still secretly withdrawing funds from the corporation; (4) no voluntarily disclosure had taken place since the amended return filed in 1973 was inaccurate, as was the return filed for 1974, and the 1970-1972 returns were never amended; (5) Bronstein had failed to cooperate with the subsequent investigation by the Internal Revenue Service; (6) Bronstein must have known that the amended return for 1973 was incorrect and (7) Bronstein had committed other wrongful acts, including directing his employees to misrepresent the weight of paper brought to the corporation's plants for handling (App. B, *infra.*, p. A-7).

Two weeks later, the court sentenced Bronstein concurrently to four years on the conspiracy count and one year on the substantive tax count; fined him $10,000 on the conspiracy count and $5,000 on the tax count, and ordered him to pay a portion of the costs of prosecution

in the amount of $5,921. The government remained silent at this proceeding. On August 20, 1979, Bronstein filed a Rule 35 motion to correct a sentence imposed in an illegal manner. The trial court denied the motion, finding that the statements made by the government at the July 20th hearing were within the factual misrepresentation exception spelled out in the plea agreement and were directed to the issue of voluntary disclosure (App. B, *infra.*, pp. A-7 - A-8).

The court of appeals held that the majority of the government's comments (enumerated 1-6 above) were made in accordance with the terms of the plea agreement in an attempt to correct the factual representation that Bronstein had attempted to make a voluntary disclosure. However, the court of appeals found that the government's comments regarding Bronstein's alleged and unrelated criminal conduct were not directed to the representation regarding voluntary disclosure or to any other factual misrepresentation made by Bronstein, and were therefore beyond the limits set out in the plea agreement. The court of appeals vacated the decision below and remanded for resentencing (App. B, *infra.*, pp. 10-12).

REASONS FOR GRANTING THE WRIT

1. In *Santobello v. New York*, 404 U.S. 257, 262, (1971), this Court declared "* * * that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." In the case at bar, the plea agreement specifically reserved the right to the defendant to call witnesses, while the prosecutor promised to remain silent, except to correct factual

misrepresentations (App. B, *infra.*, p. A-5). The court of appeals' interpretation of the agreement approves the prosecutor's comments at sentencing in order "to correct the factual representation that Bronstein had attempted to make a voluntary disclosure." (App. B, *infra.*, p. A-11)

The statements by defendant's trial counsel that Bronstein should "get credit" for making a disclosure to the Internal Revenue Service and for making a good faith effort to see that correct corporate returns were filed for 1973 and 1974 merely restated the testimony of Robert Shoemaker, a witness whose testimony the plea agreement contemplated. Defense counsel did not object to the prosecuting attorney's cross-examination of Shoemaker, which brought out additional facts, for example, that Bronstein had not disclosed to Shoemaker that the fraudulent scheme occurred in other years. Defense counsel did object to the conclusions and arguments which the prosecuting attorney strenuously urged before the sentencing judge. Surely, this was the kind of advocacy which the plea agreement proscribed. Properly interpreted, paragraphs 4 and 7 of the plea agreement must mean that the prosecuting attorney could cross-examine witnesses whom the defendant called to testify, but that he could not argue the import of their testimony to the sentencing judge, so long as Bronstein's trial counsel did not misrepresent their testimony to the court. Obviously, Bronstein's trial attorney did not misrepresent Shoemaker's testimony when he restated it as a basis for a plea of leniency.

In addition, the characterization by defense counsel of Bronstein's conduct as a "good faith attempt * * * to cor-

rect the error" (RT 106) should not have opened the door to the government's attack on Bronstein's sincerity. Defense counsel merely expressed an opinion to the court. The plea agreement conditioned the right of the prosecuting attorney to address the court on misrepresentations of fact, not of opinion. An advocate at sentencing normally emphasizes those facts favorable to his client's cause and urges the court to adopt a conclusion which would result in a lenient sentence. To hold that the assertion of a matter of opinion by defense counsel, namely that his client was in good faith, constitutes a misrepresentation of fact permitting comment by the prosecutor, would unfairly inhibit defense counsel in pleading for leniency. It would convert the government's promise to remain silent, except to correct factual misrepresentation, into a weapon to silence defense counsel at sentencing.

Of course, the government disputed defense counsel's conclusion. But the plea agreement prohibited the prosecutor from addressing the court, with the sole exception being to correct misrepresentations of fact. The government's promise to remain silent was an essential element in the decision of the defendant to plead guilty. By allowing the prosecutor to comment at resentencing on Bronstein's attempt to avail himself of the benefits of the Treasury Department's informal voluntary disclosure policy, the court of appeals decision fails to enforce the requirement of *Santobello v. New York, supra,* p. 262, that such promises "must be fulfilled."

2. We recognize that the interpretation of every plea agreement, of necessity, must turn on the particular lan-

guage which the parties employ and the particular circumstances surrounding the bargain. Nevertheless, *Santobello* acknowledged the significance of the plea bargain to the continued functioning of our criminal justice system. Promises to remain silent or mute or to make no recommendation at sentencing are among the more common inducements which prosecutors offer to secure guilty pleas. See, e.g., *United States v. Crusco,* 536 F.2d 21 (C.A. 3, 1976); *United States v. Ewing,* 480 F.2d 1141 (C.A. 5, 1973); *United States v. Miller,* 565 F.2d 1273 (C.A. 3, 1977); *United States v. Avery,* 589 F.2d 906 (C.A. 5, 1979); *People v. Kaanehe,* 19 Cal.3d 1, 559 P.2d 1028, 136 Cal.Rptr. 409 (1977); *People v. Barajas,* 26 C.A.3d 932, 103 Cal.Rptr. 405 (1972); *Sturgis v. State,* 25 Md.App. 628, 336 A.2d 803 (1975); *State v. Witte,* 308 Minn. 214, 245 N.W.2d 438 (1976); *Miller v. State,* 272 Md. 249, 332 A.2d 527 (1974); *Burroughs v. State,* 30 Md. App. 669, 354 A.2d 205 (1976); *Shepard v. State,* 549 S.W.2d 550 (Mo. Ct. of App., 1977); *State v. Waiau,* 588 P.2d 412 (Hawaii, 1978); *Barnhart v. State,* 34 Md. App. 632, 368 A.2d 1124 (1977); *People v. Gott,* 43 Ill.App.3d 137, 356 N.E.2d 1102 (1976); *State v. Tourtellotte,* 88 Wash. 579, 564 P.2d 799 (1977); *Braxton v. United States,* 328 A.2d 385 (D.C. Ct. App., 1974); *State v. Brown,* 71 N.J. 578, 367 A.2d 417 (1976); *People v. Smith,* 28 Ill.App.3d 908, 329 N.E.2d 896 (1975); *Bass v. State,* 576 S.W.2d 400 (Tex. Ct. Crim. App., 1979); *Wood v. Commonwealth,* 469 S.W.2d 765 (Ky. Ct. App. 1971); *People v. Price,* 36 Ill.App.3d 566, 344 N.E.2d 559 (1976). A decision in the case at bar as to the circumstances under which prosecutors who have made such promises nevertheless may address the sentencing court will provide guidance to prosecu-

tors, defense counsel and trial judges who deal with similar plea bargains every day.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 26, 1980

Respectfully submitted,
JOHNSTON & KLEIN

By NEIL F. HORTON
Attorneys for Petitioner

(Appendices follow)

Appendices

Appendix A

In the United States District Court
For the Western District of Washington
at Tacoma

No. CR79-16T

United States of America,
Plaintiff,

vs.

Joseph Bronstein, et al.,
Defendant.

[Filed Aug. 27, 1979]

ORDER

This Matter comes on for consideration before the undersigned judge of the above-entitled court upon the Defendant's, Joseph Bronstein, Motions, (1) To Correct Sentence Imposed in Illegal Manner, pursuant to Rule 35, and (2) For Stay of Sentence Pending Appeal. The court having fully considered and reviewed the pleadings and addendums, thereto, finds that; the government did not violate its agreement entered into with defendants' counsel and, the statements made by the government were: within the exception stipulated in the agreement regarding factual misrepresentation and were directed to the issue of voluntary disclosure.

It Is Hereby Ordered that all of the above-mentioned motions are DENIED.

The Clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

Dated at Tacoma, Washington, this 27 day of August, 1979.

/s/ J. E. TANNER

United States District Court Judge

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 79-1600
DC #CR 79-16T

United States of America,
Plaintiff-Appellee,
vs.
Joseph Bronstein,
Defendant-Appellant.

[Filed April 21, 1980]

OPINION

Appeal from the United States District Court
for the Western District of Washington.

Before: CHOY and FERGUSON, Circuit Judges, and POOLE,* District Judge

FERGUSON, Circuit Judge:

Defendant Joseph Bronstein pled guilty, pursuant to the terms of a plea agreement, to one count of subscribing a false corporate tax return and one count of conspiracy. The district court accepted the defendant's guilty plea and imposed sentence. Subsequently, the defendant filed a motion under Rule 35 of the Federal Rules of Criminal Pro-

*The Honorable Cecil F. Poole, United States District Judge for the Northern District of California, sitting by designation.

cedure[1] to correct a sentence imposed in an illegal manner, claiming that the government had breached its obligations under the plea agreement. The motion was denied, and the defendant appeals. We vacate the judgment below and remand for resentencing.

I. FACTS

The defendant was charged in a multiple-count indictment dated March 19, 1979, with subscribing false individual and corporate tax returns and with conspiracy related to these tax offenses. Bronstein's brother Irving and John Pelletier, the corporation's comptroller, were charged under the same indictment with conspiracy and aiding and abetting.[2] The indictment charged the defendant, as president of the family corporation, with diverting funds from the corporation and concealing his activities by writing cash purchase slips on non-existent purchases. Because of inaccuracies in the corporate records resulting from the defendant's activities, the corporate tax return filed for 1973 and signed by the defendant did not correctly reflect the corporation's taxable income. An amended return for 1973 was filed in 1975, but this return accounted for only about one-third of the diverted funds.

Before trial, Bronstein filed a motion to dismiss the count relating to the 1973 corporate tax return, claiming

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[1]The government has not contested the use here of the Rule 35 motion to correct a sentence imposed in an illegal manner.

[2]Irving Bronstein's case was severed from that of the defendant and Pelletier's.

that he had voluntarily disclosed the errors in the original tax return to the I.R.S. This motion was denied.[3]

On the sixth day of trial, both Bronstein and Pelletier agreed to plead guilty pursuant to a written plea bargain. Bronstein pled guilty to the conspiracy count and to the count which charged him with subscribing the original false corporate tax return for 1973. The section of the plea agreement in issue here provided:

> The Government will waive its right of allocution and will remain silent at the time of sentencing except to correct any factual misrepresentations which may occur.

The agreement also expressly provided the defendants the right to call witnesses at sentencing. The court accepted the plea agreement and set sentencing for July 20, 1979.

Prior to the July 20th hearing, Bronstein's attorney, Robert Shoemaker, sent a presentence letter to the court urging the court to grant probation. Shoemaker pointed out that Bronstein had authorized him, as the corporation's attorney, to disclose the error in the tax return filed for 1973 to the I.R.S. and that Bronstein had asked Pelletier to file a correct amended return for 1973 and a correct return for 1974. Shoemaker added that any inaccuracies in the returns were Pelletier's responsibility.

The district court did not sentence Bronstein on July 20th. Instead, the trial judge advised the parties that he wanted to learn more about the I.R.S. policy regarding

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[3]An unofficial I.R.S. policy provides that voluntary disclosure is an important factor in a decision to forego criminal prosecution. We assume that Bronstein argued that because he attempted to voluntarily disclose the error in the return filed for 1973, he should not have been prosecuted.

voluntary disclosure and would therefore not impose sentence at that hearing.

The government then presented two witnesses who testified as to the I.R.S. policy and its application to Bronstein and Pelletier. The defense called one witness, Shoemaker, who testified that Bronstein revealed to him in April or May, 1974, that Bronstein had been taking cash from the corporation. Shoemaker testified as to discussions on this point with Bronstein at subsequent meetings, and added that Bronstein authorized him in January, 1975, to disclose to the I.R.S. the error in the return filed for 1973. He also testified that Bronstein instructed Pelletier to prepare a correct amended return for 1973 and a correct return for 1974. After this meeting, Bronstein, his brother and his father[4] each redeposited $400,000 to the corporation in order to pay the taxes.

Defense counsel objected during cross-examination of Shoemaker and stated that although factual comments by the prosecution were not objectionable, comments as to the recommended nature and severity of the sentence were impermissible under the plea bargain. The government responded that it was acting within the boundaries of the plea agreement since it was correcting the factual misrepresentation that Bronstein had attempted to make a voluntary disclosure. The court ruled that this hearing was not the "time of sentencing" and that the government was therefore not bound by the plea agreement.

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[4]Bronstein's father was an unindicted co-conspirator who died prior to the indictment.

After the testimony was taken, defense counsel addressed the court, and commented that Bronstein should "get credit" for having issued instructions to file an amended return and for attempting to disclose the errors to the I.R.S. If the amended return was also incorrect, the defense counsel urged, Pelletier, not Bronstein, was to blame. Bronstein had at least made a good-faith effort to correct the error.

The court then asked for the government's position. The government responded that (1) Bronstein did not in fact rely on Pelletier to file correct returns; (2) Bronstein had been withdrawing money from the corporate account from 1970-1974; (3) Bronstein was not truly repentant when the conversations with Shoemaker took place since he was still secretly withdrawing funds from the corporation; (4) no voluntary disclosure had taken place since the amended return filed in 1973 was inaccurate, as was the return filed for 1974, and the 1970-1972 returns were never amended; (5) Bronstein had failed to cooperate with the subsequent I.R.S. investigation; (6) Bronstein must have known that the amended return for 1973 was incorrect; and (7) Bernstein had committed other wrongful acts, including directing his employees to misrepresent the weight of paper brought to Bronstein's plants for handling.

On August 3, 1979, Bronstein was sentenced concurrently to four years on the conspiracy count and one year on the substantive tax count. He was fined $10,000 on the conspiracy count and $5,000 on the tax count, and ordered to pay a portion of the costs of prosecution amounting to

$5,921.[5] The government was silent at this proceeding. On August 20, 1979, Bronstein filed a Rule 35 motion to correct a sentence imposed in an illegal manner. The court below denied the motion, finding that the statements made by the government at the July 20th hearing were within the factual misrepresentation exception spelled out in the plea agreement and were directed to the issue of voluntary disclosure.

II. INTERPRETATION OF THE PLEA AGREEMENT

This court's decision in *United States v. Arnett,* No. 79-1243, slip op. (9th Cir., Nov. 26, 1979), sets out the law of this circuit regarding the interpretation of plea bargains. The defendant in *Arnett* pled guilty to one count of a multiple-count indictment in return for the government's promise to take no position as to the appropriate sentence. At the sentencing hearing, the government did not oppose Arnett's request for probation, but Arnett was nonetheless sentenced to prison. Two days later, Arnett moved for a reduction of sentence[6] under Rule 35, but did not advance any new reasons warranting leniency. The government responded to this motion in writing, stating that

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[5]Pelletier was sentenced to the same terms of imprisonment and ordered to pay an identical share of the costs of prosecution, but was not fined. He did not file a Rule 35 motion nor has he attacked the judgment or sentence in any other way.

[6]At least three distinct motions can be made pursuant to Rule 35: a motion to correct an illegal sentence, a motion to correct a sentence imposed in an illegal manner, and a motion for reduction of sentence. Each is subject to different standards. *See Hill v. United States,* 368 U.S. 424 (1962); *United States v. Stevens,* 548 F.2d 1360 (9th Cir.), *cert. denied,* 430 U.S. 975 (1977); *United States v. Ellenbogen,* 390 F.2d 537, 543 (2d Cir.), *cert. denied,* 393 U.S. 918 (1968).

no new reasons for leniency had been advanced, circumstances had not changed, and that there was no reason for the court to change its mind. Arnett moved to strike the government's response, claiming that it constituted a violation of the plea agreement. The government argued that the time of sentencing had passed and that the plea agreement was therefore no longer in effect. The district court found for the government, and the Rule 35 motion was denied.

On appeal, this court ruled that ambiguities in plea bargains are to be resolved by looking to the facts of each case since "(w)hat the parties agreed to in the . . . plea bargain is a question of fact." *Id.* at 286. Good-faith disputes as to the terms of a plea agreement are to be resolved by the district court in which the plea was originally submitted. Remand was therefore appropriate for a finding on the intended meaning of "time of sentencing."[7]

The *Arnett* holding regarding the intent of the parties is inapplicable to the case before us. Here, unlike *Arnett*, the intent of the parties becomes clear upon an examination of the language of the plea agreement and the conduct of the parties. Consequently, there is no need for remand for the purpose of interpreting the plea agreement.

A. Time of Sentencing

In *Arnett* there was a legitimate factual dispute between the parties regarding the applicability of the plea agree-

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[7] *Arnett* is based on the Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), in which the Court held that governmental commitments made pursuant to plea bargains must be fulfilled. If the government breaches its duties, resentencing is warranted.

ment to a post-sentence proceeding. That kind of dispute did not exist in the instant case with respect to the July 20th hearing. The government has never argued that the plea agreement was not in force at the July 20th hearing. Instead, the government's sole contention is and has been that its comments did not violate the plea agreement. For example, the government's response to Bronstein's objection at the July 20th hearing (that the government was violating the agreement) was that it was attempting to correct the factual misrepresentation that Bronstein had voluntarily disclosed the errors in the tax return for 1973 to the I.R.S.[8] This clearly indicates that the government perceived the plea agreement to be in effect at that time. Accordingly, it is clear that the intent of the parties, as demonstrated by their conduct and by the language of the agreement, was that the agreement cover the July 20th hearing.

B. The "Factual Misrepresentation" Language

Remand for findings is not required on the intended meaning of the "factual misrepresentation" language contained in the plea agreement. The agreement is clear on its face.

At the July 20th hearing, the defense represented that Bronstein had made a good-faith effort to voluntarily disclose errors in the corporate return for 1973 and had relied

[8]The *court* below initially responded to the defendant's objection by ruling that the hearing was not covered by the plea agreement since sentence would not be imposed at that time. The *government's* response indicated its perception that the agreement was in effect. It should be noted that the trial court abandoned its earlier ruling in passing on the Rule 35 motion, when it held that the government had not violated the agreement.

on Pelletier to file a correct amended return. The majority of the government's comments (enumerated 1-6 above) were made in accordance with the terms of the plea agreement in an attempt to correct the factual representation that Bronstein had attempted to make a voluntary disclosure.

However, the government's comments regarding Bronstein's alleged and unrelated criminal conduct were not directed to the representation regarding voluntary disclosure or to any other factual misrepresentation made by the defendant, and were therefore beyond the limits set out in the plea agreement. Resentencing was warranted because of this breach of the plea agreement. *Santobello v. New York, supra,* 404 U.S. at 263, and the trial judge erred in denying the defendant's motion. Remand for resentencing is therefore mandated.[9]

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[9]The government urges that its comments regarding other criminal conduct were permissible because they were made in response to questions from the court. *United States v. Garcia,* 544 F.2d 681 (3rd Cir. 1976), is cited in support of this contention. However, *Garcia* does not support the argument that responses to factual questions from the court which ignore a plea bargain are permissible.

The *Garcia* defendants pled guilty to drug charges pursuant to a plea bargain under which the government promised to refrain from taking a position at sentence. At the sentencing hearing, the court asked the prosecutor if the defendant had cooperated and the prosecutor responded. The Third Circuit held that the government's response did not constitute a breach of the plea agreement since "(a)nswering a factual question put to the prosecution by the court is not, in our view, *taking a position, i.e., making a recommendation,* at sentencing. *Id.* at 685 n.2 (emphasis added). There was no breach of the plea bargain in *Garcia* which was then excused by virtue of its occurring in response to questions from the court; rather, no breach was found at all.

The decision below is vacated. We remand to the district court for resentencing in light of *Santobello v. New York*, *supra*, 404 U.S. at 263.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 79-1600
DC# CR 79-16T

United States of America,
Plaintiff-Appellee,

vs.

Joseph Bronstein,
Defendant-Appellant.

[Filed May 29, 1980]

Before: CHOY, FERGUSON and POOLE, Circuit Judges

The petition for rehearing is denied.